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THE SUPREME COURT OF THE UNITED STATES: THE INSTITUTION AND ITS RELIANCE ON FOREIGN LAW

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I would like to begin by thanking Babcock University and especially Mr. Emmanuel George for hosting this talk and for inviting me here today. It is a privilege and an honor to have the opportunity speak at this august university. I also thank the U.S. State Department and the U.S. consulate in Lagos for its support of this program, although my comments represent only my own views, not those of the United States government or of the consulate. Finally, thanks to all of you for attending this talk. I look forward to a robust question and answer period following my remarks.

The Supreme Court is one of the most venerable institutions in the United States – and certainly the most revered of our legal institutions. While the legislative and executive branches of the federal government frequently come under attack, the Supreme Court – the apex of our judicial system – historically has remained largely immune. There has, however, been a relatively recent tide of criticism against the Supreme Court. What I would like to do today is to look at the Supreme Court of the United States from an institutional perspective, and then to consider one of the areas of debate that has surrounded the Court in recent years – specifically, the reference to foreign law by the Supreme Court in some of its more controversial decisions.

I. The Supreme Court of the United States: The Institution

First, I would like to introduce to you the Supreme Court as an institution.

Constitutional Foundation

The constitutional foundation for the Supreme Court resides in Article III, section I of the U.S. Constitution, which establishes a federal Supreme Court and which delegates to Congress the authority to establish lower courts as It deems necessary. The Supreme Court is thus the final and highest judicial power in the country.

Jurisdiction of the Supreme Court

There are several notable aspects of the Supreme Court's jurisdiction that bear mention. First, federal courts – including the Supreme Court – may not issue "advisory" opinions. All cases must present justiciable issues that have ripened and that have not yet become moot, and in which the parties have standing, or an actual stake in the controversy and its outcome.

Second, the Supreme Court's jurisdiction is overwhelmingly discretionary. The Supreme Court has a very narrow category of cases over which it has "original" jurisdiction. These are suits between two states, which are usually disputes over boundaries or water rights; and those involving foreign diplomats. Such cases, as you might imagine, are not very frequent. The vast bulk of the Court's jurisdiction is appellate. There is a narrow category of cases as to which appeal is mandatory – again, a very small number of cases. The overwhelming bulk of the Court's jurisdiction is discretionary under its so-called *certiorari* review.

Under its discretionary review, losing parties from the court of appeals may petition the Court for a writ of certiorari. Such petitions may also be filed by a party aggrieved by a decision of a state court of last resort, if the case involves a question of federal law. About 8,000 petitions for a writ of certiorari are filed each year, and only about 100 are granted in a given year. The writ will be granted when four of the nine justices agree that a case should be heard. When the justices decline to grant the writ, the Court does not give a reason.

The Supreme Court's internal rules of procedure indicate that the writ will be granted "only for compelling reasons," and that it will be rarely granted when the asserted error is simply one of erroneous factual finding or the misapplication of a properly stated rule of law.

So what kinds of cases is the Court likely to review? An important goal of *certiorari* review is national uniformity on questions of federal law. So when there is a conflict in the interpretation of an important federal question between or among any of the federal courts of appeals or any of the state courts of last resort, the Court may be inclined to accept the case for review. The Court may also be likely to review lower court determinations on an important area of federal law that has not been decided by the Supreme Court. When considering whether a case bears the requisite "importance," the Court will consider the extent of the public interest involved, not simply the importance of a case to the particular litigants.

The Justices

There are nine members of the Supreme Court – one Chief Justice and eight Associate Justices.

Our Constitution provides that all federal court judges are nominated by the president and confirmed subject to the "advice and consent" of the United States Senate, a process that has become highly politicized in recent years.

The role of politics in the selection of federal court judges has become palpable during George W. Bush's presidency. During his first term in office, when Democratic senators balked at some of the president's more radical nominees and filibustered to prevent a vote on the Senate floor, President Bush took the highly unusual step of appointing those nominees to interim appointments to the federal courts during brief Congressional recesses. Although arguably permitted by the Constitution, the President's move was inconsistent with the spirit of a 1960 Senate resolution and with prevailing views about judicial independence.

In this term, friction over the President's judicial nominees reached grave proportions. The Democratic Senators continued to filibuster many of the President's nominees; the Republican majority considered a change to the rules to prevent or sharply limit filibusters, the so-called "nuclear option"; and the Democrats in turn threatened to virtually halt Senate work by insisting on strict adherence to Senate rules such as the formal and complete reading of all bills. A compromise was finally reached.

President Bush was given a rare opportunity to replace two members of the Supreme Court. Justice Sandra Day O'Connor announced her intention to resign and Chief Justice William Rehnquist passed away. Not since the early 1970s has there been an occasion on which there were two vacancies on the Supreme Court at the same time.

The current justices are: Chief Justice John Roberts, and, in order of seniority, Associate Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. I would like to give a very brief profile of each of the members of the Court:

Chief Justice John Roberts -- John Roberts began his time on the Supreme Court only last week, so little is known about what kind of Justice he will be, but he is expected to be a solid conservative. Only 50 years old, he could be a very longstanding Chief Justice. He served on the U.S. Court of Appeals for the District of Columbia Circuit, said to be the second most important court in the country. He practiced law at one of Washington's most established firms and served as principal deputy solicitor general in the first Bush Administration. A graduate of Harvard Law School and Harvard College, Roberts clerked for his predecessor, Chief Justice Rehnquist.

Justice John Paul Stevens -- Justice Stevens first took his seat on the Court in 1975. Although he was appointed by Republican President Ford, he has taken consistently liberal positions on many issues that have come before the Court. He has also proven himself to be an able consensus builder. Justice Stevens is 85 years old, and it is not expected that he will resign from the Court during President Bush's tenure unless his health makes it impossible for him to continue to serve.

Justice Sandra Day O'Connor -- The first woman on the Supreme Court, Justice O'Connor was nominated by President Reagan in satisfaction of his campaign promise to name a woman to the Court. She has often been a "swing" vote on the Court, and has turned out to be more moderate than her sponsors may have predicted. O'Connor is also a pragmatist, making it difficult to predict how she will vote in any particular case. For both of these reasons, she is considered by many to be the most important member of the current Court. Justice O'Connor will retire from the Court once the Senate confirms her successor.

Harriet Miers has been nominated by President Bush to replace Justice O'Connor. Ms. Miers is a lawyer from Texas who has served as White House counsel and who is one of President Bush's closest advisors. She has a scant public record on the issues of major concern but her views are likely to be well known by the President. Oddly enough, her nomination has elicited criticism from the right and the left, largely

because her perspective on the issues that she would be likely to confront as a justice on the Supreme Court is unknown. There is also a good deal of talk as to whether the is intellectually prepared for the challenge presented.

Justice Antonin Scalia -- Justice Scalia, also nominated by President Reagan, is undoubtedly the most colorful character on the Court, and one of the most conservative. He is clever, funny, and linguistically gifted, but with a sharp tongue. His animated dissents often take stabs at his fellow conservatives when they disagree with him. In fact, he has lodged some of his sharpest attacks at Justice Kennedy and Justice O'Connor. His approach is not likely to create a pool of solidarity among those people on which Scalia could draw as allies in other cases.

Justice Anthony Kennedy -- Justice Kennedy was appointed by Republican President Reagan but, like Justice O'Connor, he does not uniformly side with the conservatives on the Court. Indeed, Justice Kennedy has written some of the more explosive "liberal" decisions in recent terms, including those involving capital punishment and gay rights, both of which will be discussed later.

Justice David Souter -- Justice Souter was appointed by the first President Bush as a "stealth" candidate. It was thought that his nomination would provoke little debate and dissent by Senate democrats because of his paltry record on the kinds of issues that he would face on the Court; but it was also believed that he would be a solid conservative, a belief that has been belied by his record during his time on the Court. Indeed, he is a solid ally with the liberal block. The Republicans' experience with Justice Souter suggests that any stealth candidates in the future will be better vetted before their nomination. It is probably the experience with Souter that has made many Republicans concerned about the Miers's nomination, as discussed above.

Justice Clarence Thomas -- Justice Thomas is largely defined by three things: First, he is known for the highly contentious confirmation hearings at which he was accused by a former employee while he was Chair of the Equal Employment Opportunity Commission of sexual harassment, allegations that almost derailed his confirmation. Second, Thomas is known for his strenuous opposition to affirmative action and other programs that promote race-based preferences -- this despite the fact that many believe that he himself benefited from preferential treatment because he is black. Finally, Thomas may well be the most conservative member of the Court.

Justice Ruth Bader Ginsburg -- Justice Ginsburg built her professional reputation as a champion of the rights of women. She was the first of President Clinton's appointments to the Court. One of the staunchest liberals on the Court, she has not disappointed. In addition to being a advocate, Justice Ginsburg was a law professor and a judge on the U.S. court of appeals before being nominated to the U.S. Supreme Court.

Justice Stephen Breyer -- Justice Breyer, President Clinton's second appointment to the Supreme Court, has also fully satisfied expectations that he would be a strong supporter of liberal ideals. Justice Breyer was a professor of administrative law of great repute and was a judge on the federal court of appeals before assuming his position on the Court.

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What directions the Court takes in the coming years will turn heavily on what kind of jurist Justice Roberts turns out to be and on who will replace Justice O'Connor, presumably Harriet Miers.

Judicial Independence

Judicial independence is considered to be one of the bedrock principles of the U.S. legal system. The independence of the judiciary is assured by structural aspects of the U.S. Constitution and further guaranteed by the power of judicial review.

Institutional attributes of judicial independence

The Constitution contains a number of safeguards designed to ensure the independence of the federal judiciary. First, federal court judges serve during "good behavior," which has been interpreted as a grant of life tenure. Second, the Constitution forbids any diminution in salary for sitting judges. Finally, the Constitution establishes a national government premised on separation of powers, thereby structurally ensuring a judiciary that is strong and independent.

The power of judicial review

The power of judicial review is one of the most important and enduring legacies of American law. It derives from the case of *Marbury v. Madison* – perhaps the best known of all U.S. judicial decisions – issued in 1803. This decision solidified the power of the Supreme Court to review the legality of actions of other branches of government and to declare such acts to be unconstitutional. This authority represents the ultimate judicial "check" on the legislative and executive branches, and gives genuine meaning – or as we would say "bite" – to the independence of the judiciary.

The Decisional Process

Briefing and oral argument

The first step in the decisional process is the filing of briefs by the parties pursuant to a schedule established by the Court. Briefs are documents that set out the legal arguments by the parties, and contain ample references to the record of the case below and to precedent that purports to give credibility to the legal arguments. In most cases, the Court will order that the parties appear for oral argument, generally a 30-minute affair at which the members of the Court will ask questions of the lawyers for each of the parties.

The justices' reaction

Oral argument is followed by discussion among the justices and a "straw vote" as to how each Justice will vote. These conferences are private, and no one other than the justices themselves is present. The voting goes from most senior to the most junior, with the Chief Justice being the most senior by operation of law.

Assignments are then made for the drafting of opinions. The Chief Justice assigns the task of writing the majority opinion if he is in the majority. If he is not in the majority, the most senior Associate Justice in the majority assigns the opinion. Any Justice is free to write a concurring or dissenting opinion.

Draft opinions are circulated, and there is often a flurry of memoranda communications between the Justices. The opinion-writing process is thus often collaborative.

Finally, formal opinions of the Court are issued through the clerk's office.

Instantaneous publication of opinions

Supreme Court opinions are instantaneously made available to the public through slip opinions and numerous internet sites, including the Court's own website.

II. The Supreme Court's Reliance on Foreign Law

Now that I have presented a snapshot of the Supreme Court from an institutional perspective, I would like to take a closer look at one of the issues that has stirred some controversy in recent years – and that is the legitimacy of using foreign source of law in Supreme Court decisions on questions of Constitutional law.

Let me first make clear that this is a question that is different from a court's reliance on foreign and international sources of law when confronting an issue of international law or when a court applies foreign law to a question presented to it for review. Reliance on foreign and international law under those circumstances is relatively straightforward and uncontroversial, and has been ongoing since the earliest days of our Republic.

The controversy instead relates to the Court's use of foreign law in interpreting aspects of the U.S. Constitution. Like any debate, there are two sides:

One side takes the position of "American exceptionalism" -- that reliance on foreign law is misplaced because the U.S. is politically, legally, and socially distinct from the rest of the world. Justice Scalia, and to a lesser extent Justice Thomas, have been the most vocal supporters of this theory, as will be discussed below.

The other side argues that U.S. courts should look to the decisions of foreign courts in helping to inform their own judgments, a recognition that reference to the experience of others may assist our courts in coming to wise decisions. Like any other

form of non-binding authority, these jurists believe that the views of foreign nations are as persuasive as the view of other American courts and of scholarly articles. Justice Breyer has been the most outspoken and eloquent of the Justices in support of this idea. For instance, he has said:

> Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a "decent respect to the opinions of mankind…." The law of the Constitution is not free of outside influences; nor has it ever been. And if any of the ideas or values enshrined in the Constitution were ever unique, this nation has endeavored only to spread them, not to monopolize them. Federal constitutional law influences, and is influenced by, other bodies of law.

This view has been shared by a number of his colleagues.

Justice O'Connor has said "American judges and lawyers can benefit from broadening our horizons." "While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from … distinguished jurists [in other places] who have given thought to the same difficult questions we face here." She also predicted that "over time, the [Supreme Court] will rely increasingly … on international and foreign courts in examining domestic issues."

Justice Ginsburg has taken the view that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups." And she has noted that "[o]ur island or lone ranger mentality is beginning to change."

Even Chief Justice Rehnquist seemed to have taken this position, when some 15 years ago, he said the following:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States Courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

In a rare occurrence, Justices Breyer and Scalia debated this issue in a public discussion sponsored by the U.S. Association of Constitutional Law in January 2005. Scalia declared that foreign laws were irrelevant because "we don't have the same moral and legal framework as the rest of the world, and we never have." Breyer responded that, though foreign laws of course would never be binding on a U.S. court, they were still worth examining. Foreign judges "have problems that often, more and more, are similar to our own." He continued, "They're dealing with texts that more and more protect basic human rights. If here I have a human being called a judge in a

different county dealing with a similar problem, why don't I read what he says, if it's similar enough? Maybe I'll learn something."

Justice Kennedy, for his part, has proffered an international relations rationale for referring to foreign decisions. In a recent article in *The New Yorker* magazine, Kennedy reportedly made an analogy to President Bush's policy of exporting freedom. Kennedy reportedly opined: "Why should the world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means?" He continued to suggest that if we expect the world to listen to us, we should also listen to their ideas of freedom. "If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other peoples can define and interpret freedom in a way that's at least instructive to us."

Legal Scholars have also argued divisively over the appropriate use of foreign law sources in constitutional cases, an argument that closely mirrors the debate among the justices.

Recent cases have brought this debate to the fore. The controversy has come to a head over a few recent decisions of the United States Supreme Court – two involving the death penalty and one involving the rights of homosexuals.

First came the death penalty case of *Atkins v. Virginia* (2002), which involved the question of the constitutionality of imposing capital punishment on the mentally retarded. The Court held that imposition of the death penalty in such situations was inconsistent with the Eighth Amendment's prohibition on "cruel and unusual" punishment. In that case, Justice Stevens, in the majority opinion, cited in a footnote a brief filed by the European Union that indicated that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

The next death penalty case was *Roper v. Simmons* (2005*).* In that case, the Court ruled that the application of the death penalty to those who were under 18 at the time the crime was committed constitutes cruel and unusual punishment and is thus barred by the Eighth Amendment to the U.S. Constitution. In so holding, Justice Kennedy, writing for a narrow majority of the Court, said that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." In so noting, Justice Kennedy observed that a line of Supreme Court cases on the death penalty took note that the views of other "civilized nations of the world" were appropriately considered in ruling on the question what is "cruel and unusual" under the U.S. Constitution. And he concluded:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. … [T]he United States now stands alone in a world that has turned its face against the juvenile death penalty.

The final and perhaps most explosive case that is often mentioned in this debate is *Lawrence v. Texas* (2003), in which the Supreme Court declared unconstitutional a Texas statute prohibiting two consenting adults of the same gender from engaging in private consensual acts. Again, Justice Kennedy wrote the majority opinion, in which he found persuasive that the European Court of Human Rights found similar laws to be invalid under the European Convention on Human Rights was persuasive. As he said, "the right of homosexual adults to engage in intimate, consensual conduct … has been accepted as an integral part of human freedom in many other countries."

In a comment reminiscent of the debate between visions of the American Constitution as a living versus a static document, Justice Kennedy argued that the dynamic vision of the Constitution that has prevailed over U.S. history calls for the continual re-evaluation of the meaning of its provisions:

> Had those who drew and ratified the Due Process Clauses and the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Statements in these cases reflecting on the views or the world community caused scathing dissents by Justice Scalia. In his vigorous dissent in *Lawrence v. Texas*, he called the Court's discussion of foreign views "meaningless" *dicta* and a "dangerous" practice. In *Atkins v. Virginia*, the death penalty case, he called "irrelevant" "the practices of the [so called] 'world community,' whose notions of justice are (thankfully) not always those of our people." Justice Thomas, dissenting in the Texas sodomy case, also implored the Court not to "impose foreign moods, fads, or fashions on Americans."

Congressional Response

This controversy has also prompted response from the legislative branch. The three visible legislative responses have been (1) the proposed Reaffirmation of American Independence Resolution, (2) the proposed Constitution Restoration Act, and (3) calls for the impeachment of federal judges who refer to foreign law sources in their opinions.

The Reaffirmation of American Independence Resolution

The first legislative response is a resolution introduced into the House of Representatives, called "The Reaffirmation of American Independence Resolution." Although such a resolution would be non-binding, it would express the sense of the House that U.S. judicial decisions should not be based on foreign laws or court decisions.

Constitution Restoration Act

The second legislative initiative is a bill introduced into both the House and the Senate, which, if passed, would become law, unless held to be unoconstitutuinal. This bill, called the "Constitution Restoration Act," seeks to prohibit a federal court from relying upon "any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States." Prospects for success of this bill remain unclear, as does its constitutionality, but the effort does demonstrate the strong feelings that this dispute has generated.

Calls for Impeachment

Finally, there have been comments made by certain members of Congress that federal judges who continue to cite to foreign law precedents should be subject to impeachment. Impeachment, the ultimate remedy for any sitting federal judge, is limited by the Constitution to "treason, bribery, or other high crimes and misdemeanors." While it is unlikely that reference to foreign laws would fall within this purview, the fact that the threat was made suggests again the forcefulness of the attacks made on the judiciary arising out of the reference to foreign law in judicial opinions.

Conclusion

I hope that this brief discussion has given you a sense of the Supreme Court and its relationship to foreign law. This is a very exciting time to be on the watch for developments in this area, both because of the recent and impending changes in the Court's membership but also because of the recent assaults on the Court by members of Congress and the public.

I thank you very much for the honor of being here and for your attention and I look forward to your questions or comments.